

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JC PICKETT, a minor child, KV
PICKETT, a minor child, ANESSA
PICKETT, an individual, IAN
PICKETT and KHALIA PICKETT,
husband and wife, both individually
and on behalf of their minor children.

Plaintiffs.

V.

TEMPORARY HOUSING, INC.,
d/b/a CRS TEMPORARY
HOUSING,

Defendant.

NO. 2:21-CV-0174-TOR

ORDER GRANTING IN PART
DEFENDANT'S MOTION TO
DISMISS OR FOR MORE DEFINITE
STATEMENT

BEFORE THE COURT is Defendant's Motion to Dismiss or for More

Definite Statement (ECF No. 4). This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Defendant's Motion to Dismiss or for More Definite Statement (ECF No. 4) is **GRANTED in part**.

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS OR
FOR MORE DEFINITE STATEMENT ~ 1

1 **BACKGROUND**

2 This case concerns an insurance dispute that arose after a fire destroyed
3 Plaintiffs' home. *See* ECF No. 1. On May 21, 2021, Plaintiffs filed the complaint
4 against Defendant. ECF No. 1. The complaint raises the following causes of
5 action: (1) violation of duty of good faith, (2) negligent claims handling, (3)
6 violation of Washington Consumer Protection Act ("CPA") pursuant to RCW
7 19.86.090, (3) CPA injunction, and (4) constructive fraud. ECF No. 1 at 6-9, ¶¶
8 27-55.

9 On June 14, 2021, Defendant filed the present motion. ECF No. 4. The
10 parties timely filed their respective response and reply. ECF Nos. 6-7. Defendant
11 moves to "dismiss the complaint entirely, or at least the fraud claims." ECF No. 4
12 at 5. Defendant only substantively addresses Plaintiffs' constructive fraud claim.
13 *See* ECF Nos. 4, 7. The Court notes that dismissal of the entire complaint is not
14 warranted under these circumstances because the Court declines to address
15 Plaintiffs' other causes of action that are not briefed.

16 The following facts are drawn from Plaintiffs' complaint and are accepted as
17 true for the purposes of the present motion. *Chavez v. United States*, 683 F.3d
18 1102, 1108 (9th Cir. 2012).

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FACTS

2 On August 11, 2018, Plaintiffs lost their home to a fire in Kettle Falls,
3 Washington. ECF No. 1 at 3, ¶¶ 8, 10. Plaintiffs' home was destroyed and
4 unlivable. ECF No. 1 at 3-4, ¶ 15-16. Plaintiffs paid insurance premiums to
5 receive coverage for their home and personal property through a policy issued by
6 third-party Liberty Mutual Insurance Company. ECF No. 1 at 3, ¶ 9. The policy
7 included the benefit of additional living expenses ("ALE") following a covered
8 loss. ECF No. 1 at 3, ¶ 11. Liberty Mutual assigned Defendant to Plaintiffs' ALE
9 loss, giving Defendant the responsibility to research and provide appropriate ALE
10 benefits to Plaintiffs. ECF No. 1 at 3-4, ¶¶ 13, 17. Defendant is an adjuster and is
11 charged with the duties and responsibilities of an adjuster under Washington law.
12 ECF No. 1 at 3, ¶ 14. Plaintiffs' ALE loss concerned temporary housing and
13 related benefits necessary to maintain their standard of living. ECF No. 1 at 3, ¶
14 12.

15 Liberty Mutual paid for Plaintiffs to stay in various hotels and a trailer for a
16 short period of time, neither of which provided the standard of living Plaintiffs
17 were promised. ECF No. 1 at 4, ¶ 18. Liberty Mutual terminated Plaintiffs ALE
18 benefits after twelve months despite there being no ALE coverage limit and a
19 policy that provided a period of repair, restoration, or permanent relocation. ECF

1 No. 1 at 4, ¶ 19. Plaintiffs had to relocate out of Washington State to live with
2 family. ECF No. 1 at 4, ¶ 20.

3 During these events, Defendant (1) failed to explain to Plaintiffs their ALE
4 rights and benefits under the policy, (2) failed to perform a full or fair investigation
5 into Plaintiffs' standard of living, and (3) failed to perform a full and fair
6 investigation into all alternative housing options available to maintain Plaintiffs'
7 standard of living. ECF No. 1 at 4, ¶¶ 21-23. Defendant negligently or
8 intentionally failed to explain the full ALE benefits covered under the policy,
9 including that Defendant (1) failed to inform Plaintiffs of their rights and benefits
10 under the policy, (2) never investigated the needs of the Plaintiff children, (3)
11 never treated the Plaintiff children as insureds, (4) never familiarized itself with the
12 available temporary housing options in the vicinity of Plaintiffs' home, (5) never
13 sent anyone to meet with Plaintiffs, (6) failed to explore the purchase of a
14 temporary home, (7) failed to schedule motel stays for more than a week which
15 necessitated multiple moves for the family, (8) never responded appropriately to
16 Plaintiffs' expressions of distress when forced to live in unsatisfactory conditions,
17 (9) shamed Plaintiffs into believing they were not entitled to a standard of living
18 comparable to that which existed pre-loss, (10) promised a winterized trailer but
19 provided one that was too small and not winterized, and (11) contended that it was
20

1 Plaintiffs' obligation to perform the full and fair investigation into the material
2 components of Plaintiffs' ALE claim. ECF No. 1 at 5-6, ¶ 24.

3 **DISCUSSION**

4 **A. Motion to Dismiss**

5 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may
6 move to dismiss the complaint for "failure to state a claim upon which relief can be
7 granted." "The burden of demonstrating that no claim has been stated is upon the
8 movant." *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

9 A motion to dismiss for failure to state a claim will be denied if the plaintiff alleges
10 "sufficient factual matter, accepted as true, to 'state a claim to relief that is
11 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell
12 Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The burden of demonstrating
13 that no claim has been stated is upon the movant." *Glanville v. McDonnell
14 Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

15 While the plaintiff's "allegations of material fact are taken as true and
16 construed in the light most favorable to the plaintiff" the plaintiff cannot rely on
17 "conclusory allegations of law and unwarranted inferences ... to defeat a motion to
18 dismiss for failure to state a claim." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
19 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must
20 provide "more than labels and conclusions, and a formulaic recitation of the

1 elements.” *Twombly*, 550 U.S. at 555. When deciding, the Court’s review is
2 limited to the complaint, documents incorporated into the complaint by reference,
3 and judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d
4 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551
5 U.S. 308, 322 (2007)).

6 Generally, “[f]ederal pleading rules call for ‘a short and plain statement of
7 the claim showing that the pleader is entitled to relief,’ Fed. Rule Civ. Proc.
8 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement
9 of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby*,
10 *Miss.*, 574 U.S. 10, 11 (2014) (citation omitted). However, a complaint must “state
11 with particularity the circumstances constituting fraud or mistake,” though
12 “[m]alice, intent, knowledge, and other conditions of a person’s mind may be
13 alleged generally.” Fed. R. Civ. P. 9(b). To satisfy the heightened pleading
14 standard for fraud, a complaint must “identify the who, what, when, where, and
15 how of the misconduct charged, as well as what is false or misleading about [the
16 purportedly fraudulent] statement, and why it is false.” *United States ex rel.*
17 *Silingo v. WellPoint, Inc.*, 904 F.3d 667, 677 (9th Cir. 2018) (internal quotation
18 marks and citation omitted).

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1 **B. Constructive Fraud**

2 Defendant moves to dismiss Plaintiffs' constructive fraud claim on the
3 grounds that the allegations fail to meet the heightened pleading standard under
4 Rule 9(b). ECF No. 4 at 3-5. Plaintiffs distinguish between claims for fraud and
5 constructive fraud, arguing that the allegations support a claim for the latter. ECF
6 No. 6 at 5-8.

7 Under Washington law, constructive fraud is “[c]onduct that is not actually
8 fraudulent but has all the actual consequences and legal effects of actual fraud.”
9 *Green v. McAllister*, 103 Wash. App. 452, 467-68 (2000), superseded by statute on
10 other grounds as stated in *McLelland v. Paxton*, 11 Wash. App. 181, 221-22
11 (2019) (internal citation omitted). Constructive fraud is defined as a “failure to
12 perform an obligation, not by an honest mistake, but by some ‘interested or sinister
13 motive.’” *Id.* at 468 (internal citation omitted). “Washington law is not well
14 developed as to the claim of constructive fraud, but courts appear to agree that a
15 plaintiff must allege (1) an interested or sinister motive and (2) a fiduciary or
16 quasi-fiduciary relationship between the parties.” *Singleton v. Nationwide Ins. Co.*
17 *of Am.*, No. C20-5688 BHS, 2020 WL 6287124, at *2 (W.D. Wash. Oct. 27, 2020)
18 (collecting cases).

19 In 2019, the Ninth Circuit clarified that a constructive fraud claim is subject
20 to Rule 9(b)’s particularity requirement if the claim is “grounded in fraud,”

1 including where a plaintiff alleges a “unified course of fraudulent conduct.”
2 *Depot, Inv. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668, n.17 (9th Cir.), cert.
3 denied, 140 S. Ct. 223 (2019) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
4 1097, 1103-04 (9th Cir. 2003)).

5 Here, Plaintiff’s constructive fraud claim is as follows: (1) “Defendant owed
6 plaintiffs a quasi-fiduciary duty[;] (2) “The acts described above constitute a
7 breach of that duty[;]” (3) Plaintiffs experienced damage as a proximate result[;]
8 and (4) “Plaintiffs are entitled to recover reasonable attorney fees for defendant’s
9 constructive fraud.” ECF No. 1 at 9, §§ 52-55. The acts referenced include
10 allegations that Defendant made intentional and negligent misrepresentations
11 related to Plaintiffs’ ALE coverage. *See* ECF No. 1 at 5-6, ¶ 24. Based on these
12 alleged misrepresentations, the Court finds that the claim is “grounded in fraud”
13 and is subject to Rule 9(b)’s heightened pleading requirement. Plaintiffs’ claims
14 fail to meet the particularity requirement because they fail to describe the who,
15 what, when, where, how, and why of the misconduct. *See* ECF No. 1 at 5-6, ¶ 24.
16 For example, Plaintiffs fail to allege dates and places for when specific misconduct
17 occurred. Fed. R. Civ. P. 9(f) (“An allegation of time or place is material when
18 testing the sufficiency of a pleading.”). Because Plaintiffs fail to state their
19 constructive fraud claim with any particularity, the claim is insufficient as pled.
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1 Even if the heightened pleading standard were not required, the Court finds
2 that Plaintiffs failed to allege a *prima facie* case of constructive fraud. In briefing,
3 Plaintiffs assert that “a jury could easily find that [Defendant’s] conduct and
4 failures were motivated by an effort to save Liberty Mutual money on the Pickett
5 claim and/or to maintain a business relationship with the insurer for its own
6 financial benefit.” ECF No. 6 at 8. However, the complaint is devoid of these
7 allegations and devoid of any other facts asserting that Defendant had an
8 “interested or sinister motive” to support a constructive fraud claim. *Green*, 103
9 Wash. App. at 468. Therefore, Plaintiffs’ constructive fraud claim must be
10 dismissed.

11 **C. Leave to Amend**

12 Rule 15(a)(2) instructs courts to “freely give leave [to amend] when justice
13 so requires.” “This policy is to be applied with extreme liberality.” *Eminence*
14 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (internal citation
15 and quotation marks omitted). However, a court may deny leave to amend “due to
16 undue delay, bad faith or dilatory motive on the part of the movant, repeated
17 failure to cure deficiencies by amendments previously allowed, undue prejudice to
18 the opposing party..., and futility of amendment.” *Zucco Partners, LLC v.*
19 *Digimarc Ltd.*, 552 F.3d 981, 1007 (9th Cir. 2009) (internal citation and quotation
20 marks omitted). Federal Rule of Civil Procedure 15(a) governs amendment of the

1 pleadings prior to the court's filing of a pretrial scheduling order. *Johnson v.*
2 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992).

3 Here, Rule 15(a) applies where the Court has yet to file a pretrial scheduling
4 order in this case. As this case is in its early stages, the Court finds that justice
5 requires that Plaintiffs be able to freely amend their complaint.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

7 1. Defendant's Motion to Dismiss or for More Definite Statement (ECF No.

8 4) is **GRANTED in part**. Count Four for Constructive Fraud is
9 **DISMISSED**.

10 2. Plaintiffs are granted leave to **AMEND** their complaint **within 21 days**
11 of this Order.

12 The District Court Executive is directed to enter this Order and furnish
13 copies to counsel.

14 DATED August 3, 2021.



A handwritten signature in black ink that reads "Thomas O. Rice".

15
16 THOMAS O. RICE
17 United States District Judge
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